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No. 73-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

CONTINENTAL BAKING COMPANY, *Petitioner*,

v.

THE OLD HOMESTEAD BREAD COMPANY and INTERSTATE BRANDS CORPORATION, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No.

CONTINENTAL BAKING COMPANY, *Petitioner,*

v.

THE OLD HOMESTEAD BREAD COMPANY and INTERSTATE BRANDS CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINION BELOW

The United States District Court for the District of Colorado rendered no opinion. The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 1973 CCH Trade Cas. ¶ 73,433, and is reprinted in the Appendix to this Petition. (App. 1a).

JURISDICTION

The decision of the Court of Appeals, which constitutes its judgment, was entered on March 22, 1973. On May 7, 1973 the Court of Appeals denied petitioner's timely motion for rehearing. (App. 28a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding, contrary to the opinion of the Fifth Circuit Court of Appeals in *Borden Co.* v. *FTC*, 381 F.2d 175 (5th Cir. 1967), that judgment can be imposed under Section 2(a) of the Robinson-Patman Act against a seller of advertised label and private label products in favor of a competitor of the seller even though the seller shows that the lower private label price on which liability is based was in no way subsidized by, or otherwise dependent upon, the higher advertised label price with which it is compared, so that any injury to the competitor could not have been the result of a difference between the two prices?

2. Whether a seller of both private label and advertised label products "discriminate[s] in price between different purchasers," within the meaning of Section 2(a) of the Robinson-Patman Act, when the seller affirmatively offers both the private label and advertised label products to all customers throughout the market and thereby makes both prices fully available?

3. Whether a jury may be permitted to award damages under a theory that was supported solely by assumptions of plaintiff's counsel which were totally without support in the record?[1]

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[1] Petitioner will not argue here the reasons for granting the writ as to Question No. 3, and it does not urge that question as an independent ground for the exercise of this Court's certiorari jurisdiction. However, should the Court grant certiorari on either Question Nos. 1 or 2, petitioner urges that it also grant certiorari with respect to Question No. 3 since there is a clear conflict among the circuits as to whether damage calculations based on nothing but assumptions of fact which counsel instructs his damage witness to adopt are adequate to support a judgment. Compare Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972), *cert. denied*, — U.S. — (June 11, 1973) with the decision below.

STATUTE INVOLVED

Section 2(a) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a), provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

STATEMENT OF THE CASE

Continental Baking Company ("Continental") seeks review of a decision of the United States Court of Appeals for the Tenth Circuit which affirmed Robinson-Patman Act judgments for $3,468,000 entered upon jury verdicts by the United States District Court for the District of Colorado, plus $360,000 award for attorneys' fees, in favor of The Old Homestead Bread Company ("Old Homestead") and Interstate Brands Corporation ("Interstate"). The basis of jurisdiction of the District Court was 15 U.S.C. § 15.

The parties to this litigation were competing wholesale bread bakers with plants in Denver, Colorado. The "discrimination" complained of was that Continental sold private label bread in the Denver market at prices lower than prices at which it sold its advertised "Wonder" label bread in the same market.

As do all bread markets, the Denver bread market divides into three categories: "advertised" labels and unadvertised "private" labels which are sold by wholesale bakers, and "captive" labels which are baked by chain grocery-owned bakeries for sale in the chains' stores. Old Homestead became the first wholesale baker to sell private label bread in the Denver market when, in early 1964, it started selling such a loaf at one cent below its advertised label price. JA. 524-27.[2] For many years prior to this the three major supermarket chains in the Denver market, operating their own baking plants solely for the supply of their own stores, had sold their own captive labels at retail prices two cents per loaf below the retail prices of the advertised bread available to the non-affiliated retail stores. JA. 537. The three chains thus accounted for approximately seventy-five per cent of all bread sales in the Denver market. JA. 971.

Associated Grocers is a buying cooperative of retailers whose membership includes virtually every non-chain retail grocery store in the Denver market. JA. 1027-28. Responding to considerable pressure from the independent stores for a private label brand that could be priced competitively with the captive labels of the large chains,[3] Interstate began negotiating with a group of AG members early in 1964, offering the AG

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[2] Record references are to the Joint Appendix filed with the Court of Appeals. A copy of this Joint Appendix has been lodged with the Clerk of the Court.

[3] There appears to have been a period in 1964 when the chains abandoned their policy of underselling the advertised labels and were selling captive label at advertised label prices, but this temporary condition ended permanently at least by early 1965 when both captive and private labels were again selling at retail below the advertised brands. JA 1058-59, 731, 1969. Though the language of the court below is not clear, App. 5a, the court appears

stores a private label bread priced below its advertised label. JA. 596-97. Continental heard about these negotiations, entered the competition, eventually succeeded, and in mid-1964 entered into a letter agreement which was cancellable by either party on sixty days' notice to supply private label bread ("Tender Crust") to such AG stores as desired to purchase it at a price one cent below the Wonder label price, with lower prices available if less services [4] by Continental were chosen. JA. X-849. After the introduction of Tender Crust, Continental offered the same bread at the same prices under different labels to all retailers in the Denver market, thereby making the lower priced bread available to all retail stores who did not wish to participate in the AG program. JA. 1008, 1065, 1972, X-915.

Continental's private label prices were based upon its private label costs and on competition in Denver, and were in no way subsidized by, or otherwise dependent upon, Wonder label prices. JA. 747, 779. The record at trial showed without contradiction that there were substantially lower costs on private label bread so that even though private label prices were lower, profits on private label were comparable to, or even greater than, profits on advertised label products.[5] Except for a

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to have perhaps construed a resale price maintenance agreement among the AG stores to have tied the retail price of the private label which they were negotiating to purchase to advertise label prices. In fact, the agreement among the stores was to sell their private label bread at the generally prevailing price of the captive labels of the chains. JA 703-04.

[4] Not stocking the store shelves, and/or not taking stale returns.

[5] Lower costs for private label stemmed principally from two sources: (1) Continental of course did not advertise its private label brands but did advertise Wonder; and, (2) under the applicable union contract in the Denver market Continental and its

brief period during the last quarter of 1967 when there was a severe price war throughout the market, Continental sold its private label bread at a profit throughout the six years covered by the two complaints. JA. X-80-115, X-414-23. In fact, during almost all of that extended period Continental achieved a higher profit on private label bread than it did on its advertised Wonder bread. *Ibid.* These facts are detailed in an attachment to this Brief, at page A-1, which shows the comparative profit on Wonder and on Tender Crust throughout the complaint period. These profit comparisons show that throughout the period Tender Crust (and the other private labels of Continental all of which had the same prices[6] and costs for equivalent forms of delivery) was not subsidized or supported in any way by the higher prices charged for the Wonder advertised label.[7] There was no proof to the contrary

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wholesale bakery competitors paid a salesman's commission on sales of private label bread that was six per cent of the selling price lower than the commission paid on advertised label sales. JA. 979. This six per cent, coupled with the four per cent savings on advertised label, JA. X-80-115, meant that private label costs were at least ten per cent of the selling price lower than advertised label or, in other words, that when Wonder bread sold for twenty cents per loaf private label bread could sell for eighteen cents and obtain the same profit.

[6] On two occasions Continental had to grant lower prices to Tender Crust purchasers to meet the lower prices offered by Rainbo Bread Company. X-864, 886. Other lower prices were offered at the time to other retail purchasers, according to the competition that had to be met, with the result that for brief periods sometimes different prices were charged. X-1099-1113.

[7] The private label profits clearly dispel any suggestion that Continental was motivated by predatory behavior in supplying private label. The trial court itself observed that there was no evidence of predatory conduct, because there was no evidence that Continental was subsidizing its private label sales by sales at higher prices elsewhere. JA. 2294. The suggestion of the Court of Appeals that Continental was guilty of predatory behavior

in the record and there was not even an attempt at such proof.

* * * *

During the years spanned by the complaint there were periods of intensive price competition resulting in low prices and there were periods during which the market prices reached historic highs. JA. X-80-115. During these years, Old Homestead lost substantial business from time to time to other bakers, primarily to Rainbo Bread Company as to whom Old Homestead obtained a judgment in this litigation which has subsequently been settled. JA. 992, 1158. In spite of the price fluctuations normal in a competitive market, and in spite of the fact that Old Homestead lost substantial business to Rainbo in no way caused by Continental, Old Homestead was allowed to present to the jury a damage theory that ignored these facts, and instead sought to assess Continental for all of Old Homestead's alleged losses, including those caused by itself and those caused by Rainbo. This claim was concededly based solely on instructions of Old Homestead's counsel that the damage witness was to assume that, but for Continental's sale of Tender Crust, prices would have been

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because it raised its prices immediately after Old Homestead went out of business overlooks the undisputed record fact that Continental announced these price increases in mid-December 1967, well before it knew that Old Homestead was going out of business. JA. 919-20, 994.

In any event, predatory behavior is not a violation of the Robinson-Patman Act, on which statute alone the decision below was predicated. As the court below noted, predatory behavior may be relevant to the competitive injury test of the statute. App. 9a. However, it has nothing to do with whether the Act requires a showing of injury resulting from a price difference, as opposed merely to low prices, nor to whether availability negatives any discrimination among different purchasers—the two issues of law presented by this Petition.

uniformly ten per cent higher throughout the complaint period, and that but for these sales Old Homestead would have sold nine million more pounds of bread at eighteen cents per pound. JA. 1446. The trial court itself called this theory "speculative." JA. 1422 *passim*. These unfounded assumptions of counsel yielded a hypothetical result that had Old Homestead operating during the damage period at an apparent profit, whereas in fact Old Homestead had not operated at a profit since 1959—five years before the introduction of private label bread. JA. X-432.

The damage claim of Interstate was similarly based on an unsupported assumption of fact. Interstate's claim was that if Interstate's sales had increased $1,000 a week, its profit would have increased $488 each week. JA. X-1114-15. There is no way Interstate could have obtained a profit of 48.8 per cent on added sales at the market prices in the Denver market during the complaint period. This would have required the selling price of bread to be about twice the direct costs of production and sale. These costs to Interstate were 17.1 cents per loaf. JA. 2064. Market prices were never anywhere near thirty-four cents per loaf. The highest they had ever been was twenty-one cents per loaf, a level reached in the middle of the complaint period. There is no evidence whatever that Continental prevented market prices from reaching thirty-four cents per loaf.

REASONS FOR GRANTING THE WRIT

This Petition raises two fundamental issues concerning the interpretation of the Robinson-Patman Act, and the degree to which that Act may be construed to prevent sellers from passing along to their customers

the cost savings inherent in private label merchandising. The court below decided the case in a manner that results in a square conflict on one issue with decisions of other courts of appeal, and in an apparent conflict with a decision of this Court on a second issue. These conflicts require resolution by this Court. Review is additionally warranted because the decision below, if allowed to stand, will impair the ability of the smaller grocery stores to obtain from suppliers like Continental lower priced private label brands and thus compete more effectively with the larger chain stores which can produce their own private labels. The decision will also tend to dry up a source of cheaper bread for consumers.

I.

In both courts below Continental, relying principally on the Fifth Circuit's holding on remand in *Borden Co.* v. *FTC*, 381 F.2d 175 (5th Cir., 1967), argued that plaintiffs' causes of action required them to establish a connection between their alleged injury and the price difference between Continental's advertised and private label breads. Continental contended that it was not enough for plaintiffs, in a "primary-line" Robinson-Patman Act case like this one where injury is alleged to sellers competing with the defendant, to show only that they lost sales or revenues as a result of a competitor's lower price. Instead, it must be shown that injury was caused by a *difference* in prices. In non-primary-line cases, where the injury alleged is to purchasers competing in the resale of the product, the causal connection is almost inherent in the price difference since one customer is forced to pay more for the same product than does his competitor. *E.g., FTC* v.

Morton Salt Co., 334 U.S. 37 (1948). In primary-line cases, however, injury does not result from the *difference* in price, as opposed to a low price, unless the two prices have some causal relationship. In these cases the Act's requirement that actionable injury be the result of a price discrimination can only be satisfied by showing that the lower price is dependent upon the higher price.

The court below rejected this argument by not considering it.[8] In a petition for rehearing, App. 29a, Continental once again stressed the holding of the *Borden* case as to the required causal nexus, but once again the court below failed to respond. (App. 28a).

Borden, like this case, involved private label pricing where the claim was, *inter alia,* that Borden had injured primary-line competition with other milk producers by selling its private label milk at a lower price than that charged for advertised label milk in the same market. The Fifth Circuit first noted that

> "Borden did not subsidize below-cost or unrealistically low prices on its private label milk with profits received from sales of the Borden brand." 381 F.2d at 177.

It then rejected the primary-line injury claim because of

> "the absence of the necessary causal relationship between the difference in prices and the alleged

[8] The court's opinion discussed the Fifth Circuit's *Borden* opinion solely in terms of a contention relating to "consumer preference," a point that was not even raised by Continental. (App. 12a-15a).

> competitive injury. . . . [N]one of the evidence adduced by the testifying competitors relates to the price difference between the milks marketed by Borden; . . . . The competitors actually assert only that Borden was able to sell private label milk for a lower price than they could, and regarding that assertion, the price of Borden brand milk is immaterial in this case. In short, the evidence simply does not support the precise price discrimination alleged in the complaint. Therefore, injury proved in the primary line, if any, is not the *effect of* the price difference at issue." (Emphasis in original.) 381 F.2d at 180.

The facts of this case are indistinguishable. The Fifth Circuit's analysis would have required judgment for Continental.[9]

Several years earlier, in another case involving price differences within one market, a district court in the Third Circuit had reached the same result. *Shore Gas and Oil Co.* v. *Humble Oil & Ref. Co.*, 224 F. Supp. 922 (D. N.J. 1963). In language which sets forth with great clarity the rationale on which *Borden* was later based, the court said:

> "Where, as in the instant case, haphazard individual prices at varying levels are offered in a single geographic market for the purpose of com-

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[9] The Tenth Circuit's discussion of injury to competition said to result from Continental's construction of a new plant and increased market share is irrelevant to this issue. Thus, the Fifth Circuit in Borden assumed there was injury to competition but held no violation was shown because the injury was caused only by unconnected lower private label prices rather than by a price difference. See, also, Beatrice Foods Co., [1967-70 Transfer Binder] Trade Reg. Rep. ¶ 19,045 (FTC 1969).

> petitively gaining particular business accounts and primary-line injury is claimed, the principles of causation are essentially similar to those of territorial price discrimination. . . . When a seller underbids a competitor, thereby injuring him, *the injury is an 'effect' of discrimination only if the low price is supported by other prices and their profits, wherever charged.* Otherwise, the low price alone has caused the injury and the price discrimination is but incidental . . . . If the [low] price is completely self-sufficient, it may be inferred that no relationship between high and low prices exists, and therefore that the discrimination had not the prescribed 'effect.'" (Emphasis added and footnotes omitted). 224 F. Supp. at 926.

This direct recognition that in a primary-line case it is only lower prices that are supported by higher prices, and not merely unconnected lower prices, that may be the basis of a Robinson-Patman Act judgment is supported by this Court's decisions in those other primary-line cases that deal, not with different prices in one market as this case does and *Borden* and *Shore Gas* did, but with so-called territorial price discrimination. There the claim is of low prices in the market in which plaintiff competes and higher prices in markets in which plaintiff does not compete. In those cases this Court has always stressed the evidence that the low price charged in plaintiff's market was subsidized by profits made on higher prices charged in other markets. *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967); *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954). The courts of appeal have required the same evidence in these territorial cases. *E.g., Anheuser-Busch, Inc.* v. *FTC*, 289 F.2d 835 (7th Cir. 1961); *Balian Ice Cream Co.* v. *Arden Farms Co.*,

231 F.2d 356 (9th Cir. 1955), *cert. denied,* 350 U.S. 991 (1956); *but cf. Lloyd A. Fry Roofing Co.* v. *FTC,* 371 F.2d 277, 285 (7th Cir. 1966).[10]

To the degree possible the Robinson-Patman Act should be construed to permit private label merchandising rather than to prohibit it. Private label offers lower prices to consumers and permits greater equality of competition between chain and non-affiliated retail stores. The result of this case, in which Continental has suffered a judgment of almost four million dollars where its total gross sales revenue for the sales complained of during the damage period was only about 3.6 million dollars (JA. 823, X-1121), will clearly stifle similar efforts to market food products at lower prices.

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[10] These decisions requiring a showing of dependence of the low prices on higher prices are also supported by the legislative history. Congress was clearly legislating not against low prices, but against low prices subsidized by higher prices. Both houses of Congress filed identical reports in 1914 and 1936 in reporting, respectively, the Clayton Act and the Robinson-Patman Act. In 1914 both houses discussed the evil of large concerns injuring smaller concerns with local price cuts and observed:

> "Every concern that engaged in this evil practice must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of this same class of commodities above their fair market value in other sections or communities." *E.g.,* S. Rep. No. 698, 63rd Cong., 2d Sess. 3 (1914).

The 1936 reports of both houses were again identical, and said in pertinent part:

> "Discriminations in excess of sound economic differences involve generally an element of loss, whether only of the necessary minimum of profits or of actual costs, that must be recouped from the business of customers not granted them." *E.g.,* S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936).

The rule adopted by the Tenth Circuit, when coupled with this Court's decision of last term in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), would make it virtually impossible for small independent retailers to compete in the sale of private label merchandise with large vertically integrated chains. *Topco*, which was decided under the "rigid" *per se* rules that condemn horizontal restraints, 405 U.S. at 609-10, struck down a cooperative private label agreement between independent grocers designed to give them competitive equality with A&P, Safeway, Kroger and other large national chains. *Topco,* however, still allows independents and smaller chains to have access to private label, so long as they do not combine with others in a manner that violates the Sherman Act.

In the decision below, however, the Tenth Circuit has affirmed a judgment under the Robinson-Patman Act of nearly four million dollars based upon the sale of private label products to independent grocers, even though the lower prices on the private label products were themselves profitable and therefore were not supported by profits made on higher priced advertised label products. Unlike *Topco* the result below cannot be justified by reference to any rigid *per se* rules; this Court itself has characterized the provisions of the Robinson-Patman Act that are applicable to the sale of private label products as being "flexible . . . provisions" that may take account of the difference between "branded and unbranded commodities." *FTC* v. *Borden Co.*, 383 U.S. 637, 646 (1966).

The Court has previously noted that the Robinson-Patman Act was "motivated principally by congressional concern over the impact upon secondary-line competition of the . . . chain stores." *FTC* v.

Anheuser-Busch, Inc., 363 U.S. 536, 543 (1960). And the Court has recognized that it "cannot . . . construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate." *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).

Patently, the imposition upon Continental of a huge penalty for selling private label bread to independent merchants to allow them to compete with the captive label bread baked by large chain stores is not compatible with the purposes of the Robinson-Patman Act and cannot lightly be countenanced by a court that has shown sensitivity to those purposes in applying that Act. Nor is it compatible with the public interest in achieving lower food costs by eliminating expenditures, such as for advertising. This is not, of course, to argue that Continental is automatically immunized from the provisions of the Act simply because of the obvious benefits of private label merchandising. What it does show, though, is that the Court should look carefully at the decision below to determine whether a result which is clearly socially undesirable is required by the Robinson-Patman Act.

II

An additional aspect of the decision below which requires this Court's consideration relates to the generally recognized "availability" doctrine. See, Millstein, *The Status of the Availability Defense*, 42 N.Y.U. L. Rev. 416 (1967). A full expression of this Court's views on the availability doctrine is urgently needed to clarify the right of suppliers to sell private label goods at lower prices, without Robinson-Patman Act difficulties, by offering such goods to all customers at the same lower price, while at the same time continuing to offer

The court below rejected the availability contention on the ground that the Tender Crust private label was not available to those few stores that did not belong to AG unless they paid a membership fee. But Continental never rested its availability contention on the theory that the Tender Crust label was available to all stores. Instead, Continental relied on the evidence, confirmed by plaintiffs' own witness, JA. 1972, that Continental offered bread under a variety of private labels to all buyers in the market at the established private label price. JA. 928, 1008-09, 1066, X-915.[12]

The lower court also indicated doubt that the availability doctrine would apply in a primary-line case. This suggestion is without support in the authorities and appears to be contrary to this Court's holding in *Borden,* which included primary-line claims. Certainly the Act itself does not support a distinction between primary- and secondary-line for availability purposes. If a price difference is not discriminatory among different purchasers, that should be the end of the inquiry under the Act, and that result should surely not depend upon whether primary-line or secondary-line injury is alleged.

The Ninth Circuit has held that availability is a complete answer in secondary-line cases. *Chapman* v. *Rudd Paint & Varnish Co.,* 409 F.2d 635 (9th Cir. 1969); *Tri-Valley Packing Ass'n* v. *FTC,* 329 F.2d 694, 703-04 (9th Cir. 1964), *opinion on remand,* [1965-67 Transfer Binder] Trade Reg. Rep. ¶ 17,657 (FTC 1966), *aff'd and modified,* 411 F.2d 985 (9th Cir.), *cert. denied,* 396 U.S. 929 (1969). The same result is

[12] The jury was presented with the availability defense only in the same inapplicable terms as those considered by the Tenth Circuit. JA. 2659. The jury never was instructed to consider the case in terms of Continental's contention that private label prices under various labels were available to all purchasers.

equally required in a primary-line case involving a single market with no territorial price discrimination. Where a seller offers every purchaser both a lower priced label and a higher priced advertised label, the seller's conduct is totally free of any discrimination between different purchasers. The lawfulness of such fair and reasonable business conduct should not be left in any doubt or required to proceed under the cloud of confusion created by the opinion below.

CONCLUSION

The court below has reached a result that is squarely in conflict with the *Borden* decision of the Fifth Circuit, and other decisions, on a matter of fundamental importance to the construction of the Robinson-Patman Act. Additionally, the decision appears to be in conflict with this Court's own opinion in *Borden*. If permitted to stand the result below will undoubtedly inhibit manufacturers in passing on to retailers, and thence to consumers, lower food prices permitted by economies obtainable through private label merchandising. The result will also tend to solidify the competitive edge of large retail chains over non-affiliated retail stores.

For the reasons stated in this Petition, the writ should be granted.

Respectfully submitted,

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Dated: August 3, 1973

A-1

ATTACHMENT

Profit (or Loss) Comparison of Wonder and Tender Crust as Shown by C-817, 893

(In Cents, per Loaf)

	Wonder	Tender Crust
1964		
3rd	1.88	2.09
4th	1.69	2.14
1965		
1st	1.16	1.65
2nd	1.61	1.66
3rd	1.91	1.82
4th	1.51	1.34
1966		
1st	0.02	2.07
2nd	1.37	3.02
3rd	0.19	3.33
4th	2.31	3.38
1967		
1st	2.14	3.74
2nd	2.97	4.67
3rd	1.38	3.50
4th	(0.83)	(0.82)
1968		
1st	(1.61)	1.52
2nd	(0.93)	0.63
3rd	0.98	3.98
4th	0.78	3.96
1969		
1st	0.51	4.67
2nd	0.73	0.30
3rd	1.95	1.16
4th	0.97	0.60
1970		
1st	1.04	0.34
2nd	1.44	0.72

CERTIFICATE OF SERVICE

This is to certify that I have this date served the attached Petition for Writ of Certiorari on The Old Homestead Bread Company and on Interstate Brands Corp. by mailing three copies of the same, airmail postage prepaid, to their respective counsel of record John S. Pfeiffer, Gorsuch, Kirgis, Campbell, Walker and Grover, 1900 Security Life Building, Denver, Colorado 80202; and Edward L. Foote, Winston, Strawn, Smith & Patterson, First National Bank Building, Chicago, Illinois 60603. All parties required to be served have thus been served.

JOHN H. SCHAFER

August 3, 1973

APPENDIX

APPENDIX

(Filed March 22, 1973)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 71-1679—January 1973 Term

CONTINENTAL BAKING COMPANY, *Appellant,*

v.

THE OLD HOMESTEAD BREAD COMPANY and INTERSTATE BRANDS CORPORATION, *Appellees.*

Appeal From the United States District Court
For the District of Colorado
(D. C. # C-844)

John H. Schafer, of Covington & Burling, Washington, D. C. (Miles C. Cortez, Jr., of Welborn, Cook, Phipps & Brown, Denver, Colorado; Gordon A. Thomas, Rye, New York, and George R. Poehler and Charles Lister, of Covington & Burling, Washington, D. C., of Counsel, with him on the Brief), for Appellant.

John S. Pfeiffer, Denver, Colorado (Gorsuch, Kirgis, Campbell, Walker & Grover, Frederic L. Kirgis, Robert E. Warren, Jr., and Alan G. Clausen, Denver, Colorado, with him on the Brief), for Appellee, The Old Homestead Bread Company.

Edward L. Foote, Chicago, Illinois (Benjamin F. Stapleton, and Kenneth L. Starr, Denver, Colorado, Edward J.

Wendrow, and Brian A. Loftus, Chicago, Illinois; Ireland, Stapleton, Pryor & Holmes, Denver, Colorado, and Winston & Strawn, Chicago, Illinois, of Counsel, with him on the Brief), for Appellee, Interstate Brands Corporation.

Before SETH and HOLLOWAY, Circuit Judges, and LANGLEY, District Judge.

SETH, Circuit Judge (by reassignment from HOLLOWAY, Circuit Judge.

Appellee, The Old Homestead Bread Company, commenced this suit under the Sherman Act and the Robinson-Patman Act against the appellant, Continental Baking Company, Rainbo Bread Company, and Interstate Brands Corporation. Interstate crossclaimed against Continental, and Continental counterclaimed against Interstate. The action was tried to a jury which returned a verdict for The Old Homestead Bread Company against Continental in the amount of $1,048,500.00, with attorney fees of $290,000.00; and for Interstate Brands Corporation against Continental in the amount of $130,000.00 and $70,000.00 as attorney fees.

Continental has taken this appeal, asserting several errors were committed by the trial court, and that there was not substantial evidence to support the verdict of the jury.

Continental's defense to the suit was generally that it was engaged in private label merchandising of its bread and the asserted price discrimination was in accordance with its use of the private label, "Tender Crust." It also advanced the defenses of pricing to meet competition in good faith, and of cost justification.

The initial causes of action of the plaintiff-appellee Old Homestead were based on section 2 of the Sherman Act

[15 U.S.C. § 2], and on the Robinson-Patman Act [15 U.S.C. § 13(a)]. Interstate's cross claim asserted the same causes of action. All the parties were engaged in the baking business and were selling bread and other bakery products at wholesale to independent grocery stores. The bakeries concerned were in Denver, Colorado.

About two weeks before trial, Old Homestead filed an additional pretrial statement or proposed pretrial order which included reference to some additional facts not theretofore advanced, and based thereon, asserted these facts showed a violation of section 1 of the Sherman Act. A hearing was held as to this new evidence as Continental asserted that a continuance was necessary so it could conduct further discovery. The trial court denied the continuance, and ruled that this evidence, which related to the connection between Continental and Five States Supply Company, was within the scope of prior pretrial orders and issues and that Continental had access to the information. We find no abuse of discretion by the trial court in this ruling.

There was also an objection by Continental to the joining of the several claims against it, and also an objection to both plaintiffs proceeding against it at the same time. The motion was denied and properly so. There was an ordering of the proof. The trial was somewhat complicated by the several claims, and cross claims of the several parties, but not unduly so. The trial court's action in this respect was well within its discretion. See *Continental Baking Co.* v. *Utah Pie Co.*, 396 F.2d 161 (10th Cir.).

In Denver and southeastern Wyoming, before the complaint period (July 1964 through 1967), there were four principal wholesale bakeries supplying bread to the independent grocery stores. These were the appellant-defendant, Continental Baking Company, another defendant, Rainbo, which did not appeal, Old Homestead, and Interstate Brands. The retail chain stores baked bread for their

own stores and not for others. Each of the four original parties to this suit operated large modern bakeries in Denver. In 1962 Continental built a new bakery in Denver with a very large capacity, at the time it was completed its share of the market served by the non-chain bakers could be supplied with its new plant operating at about fifty per cent of capacity. The plant could not be operated profitably at fifty per cent of capacity.

Each of the parties was able to increase its sales through the year 1963, but the volume was produced at an increased unit cost. By 1964 each baker was losing money, but in July 1964 the wholesale prices for bread increased about ten per cent which was enough for each to operate profitably.

Before 1964 each bakery served its independent grocery store customers with routemen who were responsible for deliveries, placing the bread in racks at the store, and for the placement of the product in an advantageous place in the store. The record shows that the white pan bread produced by the four bakers before and after 1964 was of like kind and quality.

By far the greater number of independent grocery stores in the Denver-southeast Wyoming area during the complaint period were members of Associated Grocers (AG). This was a cooperative to purchase goods in quantity for its members. Before 1964 the members of AG bought bread from the different independent bakeries in the area. In the summer of 1964 a separate company was organized called "Five States Supply Company" to provide bread to AG members who wanted to join the new company. Five States had no separate offices or facilities, but operated through AG. For an AG member to also become a member of Five States, a fee of one hundred dollars was required, as was an agreement to comply with its bylaws. The bread to be supplied to its members by Five States was to be labeled "Tender Crust." One of the bylaws of Five States was that the retail grocer member would keep

the price of Tender Crust " . . . so that it will always be offered at the same price of any other bakery products of same quality, weight or size."

In July 1964 Continental entered into a written agreement with Five States whereby it agreed to furnish the private label "Tender Crust" bread and other bakery products. Under this agreement Continental was to also have "preferred space" on the store racks for its regularly advertised brands.

The agreement between Continental and Five States also provided that the private label price, that is the Tender Crust price, to the retail grocery store member of Five States would be at least one cent per loaf less for Tender Crust than for Continental's advertised products (Wonder Bread). It also provided that the wholesale price of *advertised labels* of Continental would be maintained at the wholesale prices of Continental's competition. The competition was, of course, Rainbo, Old Homestead, and Interstate. The result of the agreement thus was that the Five States grocers, since they had agreed to charge at retail the same price for each product of like kind or quality, always made at least one cent more per loaf on the Tender Crust bread than on other labels they sold. This agreement was referred to as the "Tender Crust program." There were some later changes by practice to include discounts of various kinds, but the basic agreement remained in effect during the complaint period.

Before the advent of the Tender Crust program there had been no private label bread sold in the area by the parties to the suit. After the program began there were several private labels and secondary labels marketed. The wholesale prices of bread also began to drop rapidly as did the volume sold by the plaintiffs.

Several officials of Continental attended board meetings of Five States from time to time and Continental assisted in preparing and circulating the newsletter of Five States.

These newsletters in 1964 and 1965 urged more AG members to join Five States, and to so participate in the Tender Crust program. There were about 112 member stores in Five States by early 1965, 167 in February 1967, and 200 in January 1968. This was out of a total of 415 AG stores on the later date.

The record shows that Continental in its Denver plants sold in 1963 about 27,700,000 pounds of bread products and lost money there in 1963, 1964, 1965, and 1966. In 1967 the operations of Continental at Denver showed a modest profit of $14,000.00, while nationally its profits were about twenty-one million dollars. In 1967 Continental had inrceased its sales in the Denver area to over 40,000,000 pounds of bread products. During the forty month complaint period the volume of sales by Old Homestead fell sharply, until, finally, on December 31, 1967, Old Homestead dropped out of the industry.

In this opinion we only give consideration to the Robinson-Patman aspect of the litigation. This case thus involves primary-line competition since Old Homestead and Interstate were in competition with Continental, the party charging the allegedly discriminatory prices. It is clear that primary-line injury is protected by the Robinson-Patman Act. *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536. For convenience, Interstate will be referred to as a "plaintiff."

The basic provisions of section 2(a) of the Clayton Act as amended by the Robinson-Patman Act are as follows:

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in

> any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . . "

To establish a claim under this Act, plaintiffs must have demonstrated price discrimination as defined by the statute, and that the effect resulting from the discrimination "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination. . . . "

The term "price discrimination" means no more than price differentiation, or the charging of different prices to different customers for goods of like grade and quality. *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536. It is undisputed that Continental charged one price per loaf for its product labeled "Wonder Bread" and a different price for its product labeled "Tender Crust Bread." It is also uncontroverted that both of these brands were of like grade and quality. Since the goods are of like grade and quality, the fact that they are sold under different labels will not justify what would otherwise be price discrimination under section 2(a). *FTC* v. *Borden Co.*, 383 U.S. 637 (1966). Therefore, the price discrimination element of this action is established by uncontroverted facts.

Price discrimination is, of course, not illegal per se. Plaintiffs, as indicated above, must have shown that the effect of the price discrimination "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . . . " The courts and the FTC have established several methods of proof directed to this injury to competition requirement.

Growth Tending to Monopoly:

By the language of the statute itself, price discrimination is unlawful if it may "tend to create a monopoly in any line of commerce." If plaintiffs here can show that this price discrimination had a tendency to create a monopoly in their "line of commerce," then this injury to competition requirement has been satisfied. *Gold Strike Stamp Co.* v. *Christensen,* 436 F.2d 791 (10th Cir.) There is some dispute in this case as to what should be considered the appropriate "line of commerce" or "relevant market." Continental argues that the relevant market includes not only the independent wholesale bakers but also the bakeries of the chain grocery stores such as Safeway. Adopting this construction, Continental's market share growth during the period of 1964-1967 was roughly from twenty per cent to twenty-nine per cent of the market. The plaintiffs, on the other hand, contend that the relevant market is that of the independent wholesale bakers only. This construction is more realistic because the customers of the independent bakers, namely the independent retail grocers, could only buy bread from the independent bakers and not from the chain bakers. Therefore, the independent bakers did not compete, directly at least, with the chain bakers and so these should be considered two different "lines of commerce." Adopting this construction, during the four-year period 1964-1967, inclusive, Continental's market share went from about thirty-five per cent to fifty-one per cent. Also, the number of competitors went from four to three when Old Homestead dropped out.

Under the monopoly cases (Sherman Act § 2), it is fairly clear that a market share of fifty-one per cent would not constitute monopoly power. See, e.g., *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir.), where, in dictum, it is stated that sixty per cent would not constitute monopoly power. However, the question here is whether a four-year growth from thirty-five per cent to fifty-one per cent is growth *tending to create* a monopoly.

Predatory Intent:

Although the statute does not speak of "predatory intent," the courts have reasoned that, from a finding of predatory intent, the jury can infer that a reasonable possibility of competitive injury exists. *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (n. 12 at 696), and cases cited therein; *Cornwell Quality Tools Co.* v. *C.T.S. Co.*, 446 F.2d 825 (9th Cir.). On the standard of "reasonable possibility," see *Atlas Building Prod. Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir.).

Since the "sum total of all the evidence must be considered" to find predatory intent, there is no set formula for such a finding. In the *Utah Pie* case, 386 U.S. 685, the Court stated that predatory intent could be found from "persistent sales below cost and radical price cuts themselves discriminatory." There is some evidence in the case before us of sales below cost during a very short period, and discriminatory price cuts represented by discounts to Tender Crust customers only. Again in *Utah Pie*, the Court stated that the Act "comes into play to regulate the conduct of price discriminators when their discriminatory prices consistently undercut other competitors," and considered this conduct to be highly indicative of predatory intent. See Unlawful Primary Line Price Discriminations: Predatory Intent and Competitive Injury, Columbia L. Rev. 68:137 (1968).

There are several significant but isolated facts in the case before us which could support a finding of predatory intent. For example, in 1962, Continental built a bakery which was the largest in the Rocky Mountain Area but which at its opening operated at thirty-three million pounds, or fifty per cent of its capacity. The vice-president testified that he knew that it could not be operated profitably until it reached seventy-five per cent capacity, or fifty-two million pounds. From 1963 to 1967, Continental increased its production by fifty per cent or from thirty-three

million pounds to fifty-two million pounds and at the end of the period was for the first time in the black. The seemingly impossible goal Continental set for itself in 1963 and, in view of the existing suppliers, the achievement of that goal would indicate that Continental's operations were based on something more than "fierce competitive instincts." The record also shows that the plaintiff Old Homestead ceased to do business on December 31, 1967, and on January 2, 1968, Continental raised its prices and did away with all discounts. There are other examples in the record which, when considered with those mentioned, could provide the jury with sufficient evidence from which to draw a strong inference of predatory intent on Continental's part. Compare the cumulation of such facts in *National Dairy Products Corp.* v. *FTC,* 412 F.2d 605 (7th Cir.).

Causal Connection:

The record clearly shows that both plaintiffs suffered some injury during the complaint period. The amount of those damages is in dispute and will be discussed below. Continental offers a variety of explanations as to why plaintiffs suffered these injuries. However, taking the record as a whole, the jury could easily infer that Continental's price discrimination incorporated in the Tender Crust program was the proximate cause of the price declines and of fluctuations during the period which resulted in lost profits and in a decline in sales actually made by appellees with a diversion of business from appellees to appellant.

A good discussion of the jury's latitude in assessing this causation factor in a case such as this can be found in this court's opinion in *Union Carbide & Carbon Corp.* v. *Nisley,* 300 F.2d 561 (10th Cir.). Having there found that the defendants had conspired and attempted to monopolize the vanadium ore market, the court considered the question of

whether or not these violations were causally related to the injuries suffered by the plaintiffs as follows:

> "In our view of the evidence, the jury might very well have concluded that the failure of the venture was due to underfinancing, mismanagement or uneconomical operation, all factors over which neither the appellants nor either of them exercised any conscious control.
>
> . . . . .
>
> "But even so, it is fairly inferable that more forces were at work to bring about the downfall of the Nisley-Wilson enterprise than the mere forces of nature or the inexorable laws of economics. In determining whether a jury finding of actionable damages is justified by the record, we must consider the plight of the enterprise in the environment of an established conspiracy to monopolize or attempt to do so . . . Viewed in this setting, we cannot say that the jury's finding of attributable harm is unsupported in the record."

In the instant case, the jury was carefully, repeatedly, and specifically instructed that no award against Continantal was justified unless the damages claimed by appellees were caused by its price discrimination. As in the Union Carbide case, although the evidence on this point was conflicting, the question was properly submitted to and resolved by the jury.

An analysis of the exhibits covering the years 1963 and 1967 permits the following tabulation to be made:

1963	Sales in Dollars	Pounds of Bread
Continental	5,100,875	27,739,659
Rainbo	2,559,039	14,938,838
Interstate	2,314,000	12,850,000
Old Homestead	4,118,938	22,850,000
Total	14,092,852	78,378,497

1967		
Continental	7,319,792	40,850,512
Rainbo	3,186,818	17,521,511
Interstate	2,879,000	16,000,000
Old Homestead	906,445	5,030,000
Total	14,292,055	79,402,023

In comparing the sales in dollars for the years 1963 and 1967, assuming that these four companies represent the total independent wholesale bread market, then Continental's sales represented $5,100,875.00 of the total $14,092,-852.00 or 36.2 per cent of the dollar volume of sales in 1963. In 1967, Continental's sales represented $7,319,792.00 of approximately the same total volume or 51.2 per cent. Also, these figures show that Old Homestead's losses during these years were not redistributed evenly over the remainder of the market but the relatively greatest amount went to Continental.

Comparing the sales in pounds, Continental's sales volume in 1963 was 27,739,659 of a total market of 78,378,497 or 35.4 per cent. In 1967, Continental's sales volume was 40,850,512 of a total market of 79,402,023 or 51.5 per cent.

The Supreme Court in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, pointed out that Congress chose language which was virtually identical for defining the injury to competition requirement for all violations covered by the different sections of the Clayton Act. The Court suggested therefore that if the anticompetitive effects of one violation are found to be proscribed by this language, then similar effects also result from a violation of another section.

The record contains substantial evidence of the injury to competition to support the finding of the jury.

Private Label and Consumer Preference:

The defendant urges that this case represents no more than the proper use and function of private label merchan-

dising, and plaintiffs' attack is on this established sales method.

"Consumer preference," as we understand the term, is the difference in price between the same product (or essentially the same) sold under a private label and under an advertised label at the point where the two labels are considered an equally good buy by the consumer. This factor of consumer preference as explained and used by the Fifth Circuit in *Borden Co.* v. *FTC*, 381 F.2d 175 (5th Cir.), is that its inclusion is necessary in order to meet the problem or situation when private and advertised label goods are of like grade and quality, but should be treated differently under the Robinson-Patman Act. Thus, when the retail price margin between these two products accurately reflects the consumer preference, the prices while actually different are considered to be commercially equal.

The defendant argues that the consumer preference price difference is a result of marketing both private and advertised labels in the same market ,and is proper. Thus it urges that the trial court should have instructed the jury to take the factor into consideration. However, there was no evidence in the record to support such an instruction, if it be a proper one, which we do not here decide. The record instead shows that the bylaws of the Five States organization established by defendant and Associated Grocers requires that the retail price of bread of all labels should be maintained at the same level. This would seem to eliminate any issue of consumer preference, and at the same time gives an extra profit margin to those able to buy the Tender Crust bread, that is, those in the "program." This consumer preference concept advanced by appellant was derived from the Supreme Court's opinion in *FTC* v. *Borden Co.*, 383 U.S. 637. In that case, the Court rejected the contention that two products, though physically identical, should not be considered to be of "like grade and quality" for Robinson-Patman Act purposes if a definite

consumer preference for one over the other has been created by advertising. The Court refused to "exempt the effective advertiser from the Act." The Court continued, "We think Congress intended to remit him to his defenses under the Act, including that of cost justification." Thus, consumer preference considerations, to the extent that they are to be recognized, are to be treated under the defenses to the Act and are not a part of the plaintiff's prima facie case under the statute. The burden of proof was on the defendant to justify what was otherwise a violation of the Act. Since no evidence was introduced on this issue, no instruction to the jury on this aspect of the defense was warranted. Therefore, we find no error in the trial court's refusal to give such an instruction.

The facts in this case and in *Beatrice Foods Co.*, FTC Docket 8663 (1969), are quite similar and the Commission there stated:

> "The record also reflects, what we know from numerous cases involving the dairy and retail food industries, that the grocery store atmosphere is highly price sensitive. It [milk in Beatrice, and bread here] is one of the most important commodities carried in retail grocery stores. It has to be purchased frequently by the consumer because of its perishable nature. The record contains ample evidence that milk [in our case bread and cake products] is frequently used as a leader and advertised at special prices. . . .
>
> "Furthermore, profit margins are notoriously low in the retail grocery business. The record shows that retailers take advantage of all available discounts and rebates in order to minimize cost and that differences in cost of a few pennies paid by the retailer for a major grocery item can have a substantial effect on gross and net profits."

The Commission also there quotes from *Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674 (5th Cir.), a case involving dis-

counts on fluid milk to a chain of eight stores in Albuquerque, where that court said:

> "... It is unnecessary that there be evidence that the favored customer actually undersold his rivals; a substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field...."

The jury could well have inferred that the built-in profit differential was the reason why the Five States organization was formed—that is to enable its members to buy the same product more cheaply than nonmembers and so have a wider profit margin. It was reasonable for the jury to have concluded that Continental was aware of this and that, if anything, they were encouraging it. Continental was aware that if retail prices stayed the same, the incentive to buy Tender Crust would always be present—that is, the grocer was always insured that his profit on Tender Crust would be more than his profit on any other label bread. Continental was thus going to be able to secure and hold a large number of grocers. Also, because Wonder bread would always take second position in stores that bought Tender Crust, Continental was going to be able to better its position in many stores and increase its sales of Wonder, at the expense of all other wholesale bakers.

The defendant urges that thet Tender Crust label was "available" to all the independent grocers and thus there was no discrimination. It would appear that the availability doctrine or defense is peculiarly inappropriate or inapplicable to a primary line case such as this, but in any event, there was an abundance of evidence showing the prerequisites to joining the program which made the label not "available" for these purposes. These requirements included a membership fee of $100.00, an agreement to give Tender Crust bread the best shelf space, with the second best to Continental's advertised label, and to participate

in the promotion of weekend specials. We find no basis to apply the availability doctrine.

Defense of Good Faith Meeting of Competition:

This well recognized defense to price cuts in circumstances such as are before us is strongly urged by the defendant Continental in this appeal.

In *FTC* v. *Cement Institute*, 333 U.S. 683 (1948), at page 725, the Court said:

> "Section 2(b) permits a single company to sell one customer at a lower price than it sells to another if the price is 'made in good faith to meet an equally low price of a competitor.' But this does not mean that § 2(b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others."

Also in *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, the Court held that a prerequisite to asserting the meeting of competition defense is that the party asserting the defense has established normal nondiscriminatory prices which he reduces to meet the equally low price of a competitor *when necessary*.

This court in *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir.), held that the good faith meeting of competition defense was a question of fact for the jury.

There is clearly enough evidence in the record before us from which the jury could have found against Continental on this defense. For example, John Barsch, sales manager of the wholesale division for Continental, testified as to how the contract with Five States was secured:

> "A. But I knew that some baker was negotiating a contract with them.

"Q. But you didn't know anything about price, did you, sir?

"A. No, sir.

"Q. So my question is that the seventeen and a half cents that you offered to them had nothing whatsoever to do with any competitive move in the market, is that correct?

"A. That's correct."

As to a later price cut, Herbert Van Wyk, plant manager of Continental at Denver, testified:

"Q. This reflects that a six percent discount on all bread sales for the Tender Crust products, is this correct?

"A. That's right.

"Q. And that was in effect as of what date, sir?

"A. 9/26/66.

"Q. And to what period, sir?

"A. Indefinite.

"Q. And what brought that about?

"A. Rainbo Bread Company came out with their Buttermilk bread at the same price as Tender Crust at that time.

. . . . .

"Q. So what you're saying is that Rainbo came out with a Buttermilk loaf of bread and charged the same price therefore that you were charging Tender Crust, is that correct?

"A. That's right."

Thus the record shows that the initial negotiations and later price cuts were made without reference to what others in the market were pricing, and there was no "meeting" of competition. It should be noted that in Beatrice Foods, the record is replete with evidence of attempts by Beatrice to find out what the competitive bids were, of Beatrice offering one price and then lowering it because told that

someone had already bid lower than that price, etc. Yet two members of the FTC, including the Chairman, did not think that this was sufficient. There is clearly an absence of evidence in the case before us from which the jury could have found that Continental initially or during the later price cuts and discounts was attempting in good faith to meet competition.

Jury Instructions:

The only specific instructions, the substance of which was not given, were the two relative to consumer preference. However, as indicated above, there was not enough evidence to warrant any instruction on this point being given, assuming the law permitted the giving of such instruction. The instructions as a whole were more than adequate to instruct the jury on the law relative to the case. They certainly covered all the legal theories involved, and as this court said in *Walker* v. *Dean,* 333 F.2d 753 (10th Cir.): "The record indicates that the jury was given . . . comprehensive instructions which adequately covered the issues involved in this case. . . ."

Interstate Commerce:

The appellant urges that there was no showing made by the plaintiffs as to interstate commerce to invoke the Robinson-Patman Act.

In *Cliff Food Stores, Inc.* v. *Kroger, Inc.,* 417 F.2d 203 (5th Cir.), the court said that since the decision in *Moore* v. *Mead's Fine Bread Co.,* 348 U.S. 115, ". . . the critical language in the statute has been repeatedly construed to mean that the seller must not only be engaged in interstate commerce, but that one of the discriminatory sales must be in interstate commerce." See also *Littlejohn* v. *Shell Oil Co.,* 456 F.2d 225 (5th Cir.); *Belliston* v. *Texaco, Inc.,* 455 F.2d 175 (10th Cir.); and *Borden Co.* v. *FTC,* 339 F.2d 953 (7th Cir.).

The record at page 931 shows that Continental had sales in Casper, Sheridan, and Lander, Wyoming. A witness from Five States Supply testified that they had the "bread program" in Colorado and Wyoming. Continental estimated that it served 277 customers who buy Wonder bread in Wyoming, Kansas, and Nebraska from the Denver bakery.

We said in *Food Basket, Inc.* v. *Albertson's, Inc.*, 383 F.2d 785 (10th Cir.), that:

> "Since Meade Bread, the critical language of 2(a) has been repeatedly construed to mean that the seller must not only be engaged in interstate commerce, but that one of the discriminatory sales must be in commerce. (Citing cases.)
>
> "It seems safe to assume that if the post-Meade Bread case law is contrary to the language used there, the Supreme Court would have corrected the misinterpretation on repeated applications for certiorari. We take the statute to mean what it says, i.e., that at least one of the discriminatory sales complained of must be in commerce."

Thus as to interstate commerce, the officers of Five States Supply testified that they had the Tender Crust program in Wyoming; an officer of Continental estimated they had 277 customers of the Denver bakery in Wyoming, Kansas, and Nebraska. Thus it is clear that the interstate commerce requirement has been fully met.

The Verdict:

The jury returned a verdict on July 2, 1971, in favor of The Old Homestead Bread Company and against Continental Baking Company on each of Old Homestead's claims in the amount of $262,125.00. The foreman, responding to a question asked by the court at the request of plaintiff's

attorney, stated that it was the intention of the jury that the amounts awarded on each of the four claims were to be added together to arrive at the total amount of damages that the jury had intended to award that plaintiff. Each juror was then asked separately if that was his or her intention, to which they all responded affirmatively. Thereupon the jury was asked to return on July 6, 1971, at which time the trial judge submitted a supplemental interrogatory to them as to Old Homestead, reading as follows:

> "What did the jury find the damage to be to Old Homestead Bread Company as total damages in each and all of its claims against Continental Baking Company reflecting the total amount of loss suffered by Old Homestead Bread Company resulting from the conduct of Continental Baking Company?"

The jury answered that question this way:

> "We the jury found that the total amount of damages suffered, that is, loss of profit, out of pocket loss and loss of going concern value arising from each and all claims was $1,048,500.00."

The original verdicts were then resubmitted to the jury which crossed out the amount of $262,125.00 and in its place inserted $1,048,500.00 on *each* of the separate verdicts.

Continental claims that since the jury was instructed that it could not cumulate damages, and in light of the "well recognized policy against impeachment of verdicts," this was error. Careful review of the instructions to the jury disclosed only the following language relative to cumulation of damages, given by the trial judge at the beginning of the long, complicated instructions:

> "As you know, it is not a single lawsuit. In the first place, the plaintiff has brought an action against Continental on three different theories, violation of the Sherman Act, Section 1, and Sherman Act, Section 2,

and the Robinson-Patman Act. These are alternative approaches, though. First, you are not called upon to assess the amount of damage as to each one of them and then accumulate them, if you were to decide in their favor, there is no assurance they will be, because they all come out of the same nucleus of thought, and as I say are simply different legal theories and different remedies which are advocated to recover an award of damages.

"Consequently, I say this to you now and I think it ought to be kept in mind that they are entitled to a single recovery. In other words, if you were to, and I am not saying that you are apt to, decide in their favor on each of their alternative claims, still and all, there couldn't be any accumulation of it. It would simple [sic] be a recognition of the several claims that they have advocated."

In our opinion, these references as to how the jury was to record the amount of damages, if any, that they found on each of the separate verdicts, coupled with the length and complexity of the trial and the instructions, does not bar an interrogatory as to the true intent of the jury relative to an award of damages.

This court has said, in *Young* v. *United States*, 163 F.2d 187 (10th Cir.):

"The rule to which reference has been made excluding testimony or affidavits of jurors to impeach the verdict for misconduct of members of the jury occurring within the jury room and in connection with the deliberations of the jury does not prevent the reception of evidence of jurors to show that through mistake, the real verdict on which agreement was reached in the jury room was not correctly expressed in the verdict returned into open court.

"... But the jurors are competent witnesses for the purpose of showing that through oversight, inadvertence, or mistake respecting the substance of the verdict returned into court, is [sic] was not the verdict on which agreement was actually reached in the jury room...."

See also *Freid* v. *McGrath*, 135 F.2d 833 (D.C. Cir.), where the distinction is made where there is a mistake not apparent on the face of the verdict as compared to attempts to impeach the verdict on various other grounds.

The reason and method used here were proper to correct the verdict first returned.

Amount of Damages:
Old Homestead—

As mentioned above, the jury awarded Old Homestead a total of $1,048,500.00 before trebling, of which $38,660.00 was attributed to going concern value of the business on the date of dissolution, December 31, 1967, after having been in business seventy years.

When, as a result of defendant's violations of the antitrust laws, a plaintiff's business ceases operation, an award for the "going concern value" on the date of cessation has been upheld. See *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555 (1931); *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 421 F.2d 61 (1st Cir.). See also *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir.), where this court upheld allowing the jury to "consider as another element of damages the extent to which the value of appellee's profit or the net worth of its assets had been diminished as a result of the price discrimination."

In the instant case, the jury was instructed that it could award damages for going concern value and the court gave

a brief but adequate explanation of what elements to consider in making an award. We have examined the record and in light of the facts, the award of $38,660.00 certainly is supported by substantial evidence.

Old Homestead's computation of its claim for lost profits is shown in Exhibit X-433. Basically it took its total sales volume for the complaint period, multiplied that by ten per cent (to account for the average drop in prices throughout the period) and subtracted six per cent of that figure for commissions which would have been due. The resulting figure is $1,059,501.00. The jury's award for lost profits was $1,009,840.00 ($1,048,500.00 minus $38,660.00 for going concern value).

As Old Homestead states in its brief, its damage claim is predicated on the assumption that the ten per cent price increase of July 10, 1964 (July price), would have held but for Continental's violations. Defendant does not show that the July price was less than ten per cent higher than the average price through the period. Its attack centers on the causation question and on the assumption that the July price would have held but for the alleged violations. There was evidence before the jury to support the position of plaintiff as to the July price level and its being a reasonable price.

As to the validity of the assumption of the continuation of the July 1964 price, there is the evidence relating to defendant's actions on prices. The question of what the wholesale price would have been but for the introduction of the Tender Crust program is incapable of exact resolution. The interaction of the factors ensuing immediately at that point make the continuation at the assumed price a matter of inference. However, in cases such as this, the courts have repeatedly and consistently held the plaintiff to a lower standard of proof than he is normally required to meet.

"Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such a case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."

Story Parchment Co. v. *Paterson Co.*, 282 U.S. 555, 563.

"The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which he has all along created."

Bigelow v. *RKO Radio Pictures, In* , 327 U.S. 251, 265.

This position was recently reaffirmed by the Supreme Court in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969). It has been otherwise stated: " . . . having thus established the factum of damages, the amount thereof may be fairly approximated by the jury." *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir.). Also:

" . . . When wrongdoers, by their very actions, make it virtually impossible to prove damages precisely, they should not be heard to complain of the method of proof, if the method allowed by the trial court is reasonable under the facts and in the circumstances of the case."

North Texas Producers Ass'n v. *Young*, 308 F.2d 235, 245 (5th Cir.).

The next question, therefore, is whether or not the method of proof used by Old Homestead was reasonable under the circumstances of this case. In this regard, the case of *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 545, seems to be virtually dispositive of the question. That was a Sherman Act case alleging price-fixing and conspiracy to monopolize. In reviewing the damages issue, the Court reasoned as follows:

> "There was evidence from which the jury could reasonably have found that . . . current prices, shown in detail, were higher during a period antedating the unlawful combination and price cutting in pursuance of it than afterward. It does not necessarily follow, of course, that these higher prices would have continued except for the conspiracy, but it is fair to say that the natural and probable effect of the combination and price cutting would be to destroy normal prices, and there was evidence of the prices received by petitioner before the cut prices were put into operation, and those received after, showing actual and substantial reductions, and evidence from which the probable amount of the loss could be approximated. The trial court fairly instructed the jury in substance that if they were satisfied that the old prices were *reasonable* and that they would not have changed by reason of any economic condition, but would have been maintained except for the unlawful acts of the respondents, the jury might consider as an element of damages the difference between the prices actually received and what would have been received but for the unlawful conspiracy." (Emphasis added).

The Court continued, stating the great latitude the jury had in such cases, and concluded by upholding the verdict.

The only possible point of departure in the instant case is that the July price was in effect for only a few weeks prior to the price war. Under some circumstances, this

fact might be fatal to the plaintiffs' case. Here, however, plaintiffs took great pains to establish that the July price was a "reasonable price" and, therefore, would have held or gone higher.

The record shows that through the early 1960's, bread sales in the Denver area were up but costs were up even higher and prices had remained constant with the effect that profits were decreasing. By 1964, all competitors went in the red. From this evidence, plaintiffs argue and it can be inferred that the price increase of July 1964 was badly needed and was reasonable. This evidence lends support to the finding that the July price was "reasonable" and would have held. For another early Sherman Act case on point, see *Thomsen* v. *Cayser*, 243 U.S. 66 (1917). This court employed a similar method of computing damages in *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir.). There it appears the jury was allowed to determine what the reasonable price would have been throughout the complaint period and assess as damages the difference between the actual prevailing price and this hypothetical price. The *Union Carbide* case was cited by the Southern District of New York for the following proposition: "Reconstruction of a competitive price based on supply, demand, costs and other economic indicators is a logical and judicially recognized technique." *Ohio Valley Electric Corp.* v. *General Electric Co.*, 244 F.Supp. 914 (S.D. N.Y. 1965). In that non-jury case, the court described in detail how it arrived at the "competitive price" upon which to base its damage award. 244 F.Supp. at 946. Plaintiff was allowed to project the price reduction against the sales made through the period to compute its damages in *American Cooperative Serum Ass'n* v. *Anchor Serum Co.*, 153 F.2d 907 (7th Cir.). See also *Dean Foods Co.* v. *Albrecht Dairy Co.*, 396 F.2d 652 (8th Cir.).

Old Homestead's method of proof of damages was reasonable and proper under the circumstances. There was sufficient evidence from which the jury could reasonably infer that the result of Continental's violation was to de-

press prices by approximately ten per cent throughout the complaint period, and that, therefore, the award to Old Homestead for lost profits was proper and based on substantial evidence.

Interstate Brands—

As mentioned above, the verdict awarded Interstate was $130,000.00 in damages, before trebling, presumably for lost profits on sales diverted from Interstate to Continental or at least on diverted sales caused by the Tender Crust program. One confusing aspect of the damage issue is that Old Homestead and Interstate used two completely different methods for computing lost profits. However, both methods appear to be reasonable and proper so this fact is of no real consequence.

Interstate's method was to introduce charts filled out by its routemen indicating the weekly sales made to each customer store before and after the Tender Crust program. These charts are in the record at X-934 through X-1045.

Interstate produced a witness, Mr. Nees who testified basically that if sales had increased $1,000.00 per week, Interstate would have realized an extra $425.00 per week in profits. In other words, the profit percentage on an *additional* volume of sales per week was 42.5 per cent. His theory was based on incremental accounting. This testimony gives sufficient evidentiary support to the assumption that Interstate would have made at least twenty per cent profit on these sales which were diverted because of the impact of the Tender Crust program. This, together with an analysis of the routemen's charts, demonstrates that there was a basis for the jury verdict which is almost exactly the figures derived from the charts. There was thus substantial evidence to support the jury verdict in favor of Interstate.

There was indeed sufficient evidence before the jury upon which to base the verdicts, and we find no error in the various rulings by the trial court. The case is thus AFFIRMED.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM—MAY 7, 1973

Before Honorable Oliver Seth and Honorable William J. Holloway, Jr., Circuit Judges, and Honorable Edwin Langley, District Judge.

No. 71-1679

CONTINENTAL BAKING COMPANY, *Appellant*,

v.

THE OLD HOMESTEAD BREAD COMPANY and INTERSTATE BRANDS CORPORATION, *Appellees*.

This matter comes on for consideration of the petition for rehearing filed by the appellant.

Upon consideration whereof, the petition for rehearing is denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 71-1679

CONTINENTAL BAKING COMPANY, *Appellant,*

v.

THE OLD HOMESTEAD BREAD COMPANY and INTERSTATE BRANDS CORPORATION, *Appellees.*

Appeal From the United States District Court
for the District of Colorado

Petition for Rehearing

Appellant Continental Baking Company respectfully petitions the Court for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure. The basis for the petition is that the Court has overlooked or misapprehended two of the principal grounds on which the judgments entered below were appealed.

I.

A principal ground for Continental's appeal to this Court was that appellees wholly failed to establish that Continental's prices for its private label products were subsidized by, or otherwise related to, any higher prices for Continental's other products. Continental has urged that such a showing is an essential ingredient of appellees' Robinson-Patman Act claims, and that the absence of such a showing entitled Continental to entry of judgments notwithstanding the verdicts on those claims.

It is rudimentary that the Robinson-Patman Act does not forbid all price differences. Preliminarily, the Act forbids only those price discriminations as to which a causal relationship" is shown to exist "between the difference in prices and the alleged competitive injury." *Borden Co.* v. *FTC*, 381 F.2d 175, 180 (5th Cir. 1967). The Court's opinion in this case appears to conclude that this "causal relationship" is a matter that may be left to the speculations of the jury. Op. at 14-18. Whatever the merits of that conclusion, it altogether overlooks an essential additional requirement that has been imposed in primary line cases, such as this.

It has been unequivocally held that in primary line Robinson-Patman Act cases, such as this, the low prices complained of must have been "supported" or "financed" by "other prices and their profits . . . ." *Shore Gas & Oil Co.* v. *Humble Oil & Refining Co.*, 224 F.Supp. 922, 926 (D.N.J. 1963). Unless such a showing is made—unless other prices have been used by a defendant to "subsidize below-cost or unrealistically low prices," *Borden Co.* v. *FTC, supra* at 177—any injury to competitors has been caused by low prices alone, and not by any difference between high and low prices. *Shore Gas & Oil Co.* v. *Humble Oil & Refining Co., supra* at 926. If injuries caused by low prices alone were held to be violations of the Act, price competition would be discouraged and a principal purpose of the antitrust laws would be frustrated.

This same principle—that a connection between high and low prices is an indispensable ingredient of a Robinson-Patman Act violation in primary line cases—has also been applied in numerous cases involving geographical price differences. *See, e.g., Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Maryland Baking Co.* v. *FTC*, 243 F.2d 716 (4th Cir. 1957); *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F.2d 234 234 (2d Cir.), *cert. denied*, 279 U.S. 858 (1929).

This principle is dispositive of the Robinson-Patman Act judgments in this case. No showing was made by appellees that Continental's prices for its private label products were subsidized by, or otherwise related to, Continental's prices for its other products. The private label price stood on its own bottom throughout the complaint period. Far from a below-cost or subsidized price, the private label price was, almost uniformly through the complaint period, more profitable than Continental's price for its advertised brand. App. Br., Appendix A. In these circumstances, "the low price alone . . . caused the injury," *Shore Gas & Oil Co.* v. *Humble Oil & Refining Co., supra* at 926, and no proper basis exists for the Robinson-Patman Act judgments entered below.

This issue has nothing to do with consumer preference. The Fifth Circuit held in *Borden Co.* v. *FTC, supra,* that consumer preference is relevant in a secondary line case to determine whether competitive injury has occurred among competing retailers. If the difference in price reflects no more than consumer preference for the higher priced brand, that price difference creates no competitive advantage for the lower priced brand. This, however, is a primary line case to which consumer preference is irrelevant.

II.

A second principal ground for Continental's appeal was that its cost justification defense entitled it to the entry of judgments notwithstanding the verdicts on appellees' Robinson-Patman Act claims. App. Br. 25-28; App. Reply Br. 12-17. This Court's opinion merely acknowledged that a cost justification defense was made, Op. at 3, without giving it substantive consideration.

Continental submitted exhibits that compared quarterly cost figures for the production and distribution of its advertised and private label breads in the years 1964 through mid-1970. R. X-80-115, X-414-23. Summaries of the prin-

cipal cost justification exhibits were included as Appendices A and B to Continental's brief in this Court. Continental's evidence showed without contradiction that, with the exception of five quarters, its lower priced private label bread was cost justified—indeed, more than cost justified. In the five quarters in which Continental's private label prices were not fully cost justified, the underjustification was *de minimis*—of the order of 4/10 of one cent. R. X-419-23. None of the five quarters of underjustification occurred while Old Homestead remained in business.

This evidence has never been effectively contested by appellees. Counsel for Old Homestead did not even argue the issue to the jury on closing. The arguments made to the jury on this issue by counsel for Interstate were patently without merit. App. Br. 25n. In this Court, the only effort to contest the cost justification defense was again made by Interstate. It offered no more than a misstatement of the law and random objections to Continental's cost computations, all without merit. App. Reply Br, 12-17. The simple fact is that Continental has offered "controlling, positive, and uncontradicted evidence" that was "unimpeached" and "not inherently improper." *Nicholas* v. *Davis,* 204 F.2d 200, 202 (10th Cir. 1953). Such evidence "may not be disregarded." *Id.* If it is not disregarded, Continental plainly is entitled to entry of judgments notwithstanding the verdicts on appellee's Robinson-Patman Act claims.

CONCLUSION

For the reasons stated above, rehearing should be granted, the judgments of the court below on the Robinson-Patman Act claims should be vacated, and the judgments on the Sherman Act claims should be vacated for reasons set forth in our briefs.

Respectfully submitted,

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No. 73-227

In the

Supreme Court of the United States

OCTOBER TERM 1973

CONTINENTAL BAKING COMPANY,
Petitioner,

v.

THE OLD HOMESTEAD BREAD COMPANY and INTERSTATE BRANDS CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT OLD HOMESTEAD BREAD COMPANY IN OPPOSITION

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In the

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CONTINENTAL BAKING COMPANY,
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THE OLD HOMESTEAD BREAD COMPANY and INTERSTATE BRANDS CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT OLD HOMESTEAD BREAD COMPANY IN OPPOSITION

STATEMENT OF THE CASE

Old Homestead Bread Company ("Old Homestead") sought and acquired judgment against Continental Baking Company ("Continental") based upon separate jury verdicts, finding that Continental had violated four different provisions of the federal antitrust laws: conspiracy in restraint of trade (JA. 2726); attempting to monopolize (JA. 2727); conspiracy to monopolize (JA. 2728); and unlawful price discrimination (JA. 2729). All four verdicts were submitted to the Court of Appeals for its consideration and although that court

discussed only the unlawful price discrimination aspects of the case it clearly affirmed all four verdicts by its concluding remark:

> "There was indeed sufficient evidence before the jury upon which to base the *verdicts,* and we find no error in the various rulings by the trial court. The case is thus AFFIRMED." (Emphasis supplied) App. to Petition 27a.

Continental has sought review of the verdict based upon the violation of Section 2(a) of The Robinson-Patman Act amendments to the Clayton Act only and apparently does not seek review of the judgment based on the other three verdicts.

The parties to this action were the competing wholesale bakers serving the Colorado and Southeastern Wyoming market. Old Homestead, the only locally-owned bakery in the market, baked "Town Talk" bread; Continental, the world's largest baking company (X. 542), baked "Wonder" bread; Interstate Brands baked "Butternut" bread; and, the Rainbo companies baked "Rainbo" bread. The large retail chain stores, Safeway, King Soopers and Millers (National Tea), baked and sold their own bread and thus were not in the wholesale bakery business. JA. 478-79, 548, App. to Petition 8a. The majority of the independent grocers in the market were members of a cooperative called A.G. (Associated Grocers) and purchased their bread requirements from the wholesale bakers. JA. 479. The lead or volume product of all the wholesale bakers was the one pound loaf of white pan bread. JA. 476, 1041-42.

In 1962 Continental built and opened the largest bakery in the Rocky Mountain area (X. 502, JA. 739), which was more than twice the size of its previous two bakeries combined (JA. 1532, 1538), in spite of its knowledge that this new plant would be running at no more than 50% of its capacity based on production figures available at the time (JA.

1538). Continental had to run its new plant substantially in excess of 50% of its capacity to make a profit. JA. 1695-96.

Prior to August of 1964 the wholesale bakers all merchandised their products through route salesmen, who competed for preferred position and adequate space on the bread rack in each store served. JA. 474-76. Adequate preferred space was a critical prerequisite to the successful merchandising of bread and was obtained by securing the good will of each store manager through prompt and courteous service. JA. 475-76, 793, 1253.

Although A.G. had previously asked, the wholesale bakers had refused to provide a private label bread program (JA. 524), because of the bitter wholesale price war that would result from any attempt by one baker to tie up the majority of bread purchasers in the market (JA. 560-61, 719, 726-27).

Continental needed volume of sales (JA. 776, 1695-96), and A.G. wanted a private label bread program which would provide its members with greater profits (JA. 686). In the summer of 1964 Continental began increasing its volume of sales and A.G. acquired its private label bread program through what became known as the "Tender Crust Program."

An affiliated corporation of A.G. was formed called Five States Supply Co. ("Five States"). X. 764-67, JA. 579. Upon payment of a $100 fee (X. 822, JA. 626) and the execution of a statement binding the applicant to covenants set forth in the Company by-laws (App. 1a), a member of A.G. could join Five States (JA. 591). These covenants required all members to give first position on their bread racks to the private label baked by Continental (Tender Crust) and second position to the Continental's advertised products (Wonder) (X. 753, JA. 579) and, that they keep the price of Tender Crust ". . . so that it will always be offered [to the public] at the same price of any other bakery products of the same quality, weight or size" (X. 753, JA. 579).

Five States and Continental entered into a written agreement (App. 3a), which provided that the wholesale price of Tender Crust to the retail grocery store member of Five States would be at least one cent per loaf less than the price charged for Wonder products (JA. 754-55, 773, 841-42, 846, 866, 881-82, X. 852, JA. 600). And further, the wholesale price of the Wonder products would always be maintained at the wholesale prices of Continental's competition (JA. 755, 841-42, 846, 866, 881-82), that is, Rainbo, Old Homestead and Interstate. As a result, the profit to the grocer was always at least one cent greater on Tender Crust products than on the products of any competitor of Continental. JA. 623-24, 686-87, 1266. Under the Tender Crust program there clearly were no price benefits available to the public.

The Board meetings of Five States were frequently attended by Continental personnel (X. 673, 676-77, 712-13, 730, JA. 579), and its weekly newsletters were typed and mailed by Continental to all member grocers after the contents thereof were reviewed and discussed by representatives of Continental (JA. 614-15, X. 770-821). New Members solicitation meetings were held by Five States at the Continental plant with representatives of Continental urging membership. JA. 625-27, 674. In 1965, 112 grocers joined the program; by February of 1967 there were 167 members; and in January of 1968, the membership had grown to 200 members, out of a total of 415 eligible A.G. stores. X. 775, JA. 616, X. 833-42, JA. 588.

Immediately after the Tender Crust program began, Continental's competitors reduced prices (JA. 761, 1955), gave discounts, introduced private and secondary labels and employed other defensive tactics (JA. 971, 1167-68, 1191-92). Continental, in addition to granting discounts, would always match the price of its competition with its Wonder products, then sell its Tender Crust products to the grocer at least one cent be-

low the price of its Wonder products. JA. 971, 981. The wholesale prices of bread plummeted as did the volume sold by Old Homestead. JA. 796, 934. The wholesale price of the one pound loaf went from 20.5 cents in July of 1964 to 13.2 cents in the fall of 1967. JA. 915-16, X. 843, JA. 742.

Between July of 1964 and January of 1968, Continental's volume of sales went from 27.7 million pounds to 40.8 million pounds, and its receipts from $5.1 million to $7.3 million. X. 827. Between 1963 and 1966 Continental lost money at its Denver plant. X. 823, JA. 2099. In 1967 it made a modest profit of $14,000. Nationally, Continental profits were in the millions of dollars for all years. X. 823. In contrast, and as noted by the Court of Appeals (App. to Petition 12a) Old Homestead's volume of sales went from 22.8 million pounds in 1963 to 5 million pounds in 1967 and its dollar sales from $4.1 million in 1963 to $900,000 in 1967. X. 432, JA. 518.

Predictably (JA. 1034, 1265-67), Continental's only local competitor (JA. 474), Old Homestead, after successfully serving the market since 1892 (JA. 801) closed its doors and left the industry on December 31, 1967 (JA. 515). Two days later Continental removed all discounts and raised its prices on all products. JA. 919-20.

REASONS FOR DENYING THE WRIT

The holding below does not pose any substantial issues of federal law or public policy. Nor does it, as Continental contends, represent an attack on the institution of private label merchandising. Only Continental's peculiar methods of misusing the private label system for predatory purposes were at issue in this case. Continental's private label program not only failed to afford any benefit whatsoever to the consumer but it actually prevented price competition at the retail level, by requiring retail grocers to sell all of their bread loaves at the same price, regardless of differences in cost or label. Moreover, there are no conflicts between the decision in this case and the decisions of any other United States court of appeals,

as an analysis of the decisions and the evidence of record will demonstrate.*

Further, since Continental attacks but one of the four antitrust verdicts against it, no useful purpose would be served by consideration of the single verdict now being assailed.

I.

THE EVIDENCE IN THE RECORD AMPLY DEMONSTRATES THE CAUSAL CONNECTION BETWEEN CONTINENTAL'S UNLAWFUL PRICE DISCRIMINATION AND OLD HOMESTEAD'S INJURY, AND THERE EXISTS NO CONFLICT BETWEEN THE HOLDING OF THE COURT BELOW AND THE FIFTH CIRCUIT'S HOLDING IN THE *BORDEN* CASE.

Continental has made an imaginative attempt to create a phantom conflict between two circuits in this case. The alleged conflict is said to exist between the holding of the Fifth Circuit in *Borden Co. v. FTC,* 381 F.2d 175 (5th Cir. 1967), and the ruling of the Tenth Circuit in the present case on the question of causal connection between the price discrimination and the injury to plaintiffs. In *Borden* the Fifth Circuit commented by way of dictum that among several other deficiencies in the case against Borden the evidence had shown that "Borden did not subsidize below-cost or unrealistically low prices on its private label milk with profits received from sales of the Borden brand." 381 F.2d at 177.

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*Continental's statement that Plaintiff's damage theory "was supported solely by assumptions of Plaintiff's counsel which were totally without support in the record" is palpably erroneous. Plaintiff's damage theory is supported in law by this Court's decision in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), and in fact by the following references: JA. 506-509, 742-44, X. 428-36 JA. 1224, 1452, 1457, X. 843-47, JA. 742.

In the present case the Tenth Circuit did not discuss the question of subsidization, for it found that "the record shows that both plaintiffs suffered some injury during the complaint period" and that "taking the record as a whole, the jury could easily infer that Continental's price discrimination incorporated in the Tender Crust program was the proximate cause" of the plaintiffs' injuries. App. to Petition, 10a. It may thus be seen that the "conflict" which Continental so dramatically emphasizes lies between a comment on the evidence or a dictum by the Fifth Circuit and the fact that the Tenth Circuit did not even feel the need to discuss whether there was or was not a "subsidization."

Continental's primary argument is that there was no relationship or "causal nexus" between the damages suffered by Old Homestead and the differences in prices charged by Continental for its private and advertised label breads respectively. Petition, 2, 5, 6, 9-12, 14.

This is, indeed, an ostrich-like position for Continental to take, for it is precisely this price differential that prevented any wholesale baker in the market, including Old Homestead, from competing with Continental. JA. 1285-87. The very keystone of the "Tender Crust" program was Continental's absolute guarantee that its private label products would always be priced at least one cent per unit less than its advertised label products (JA. 623, 755-56, X. 723, JA. 579), no matter what the cost (JA. 841-42).

This price differential must be considered in context, however. The by-laws of Five States contained the price stablization provision (App. 1a) that the retail price of Tender Crust would be the same as the retail prices of all advertised products. Continental, of course, was well aware of this by-law provision; its representatives had even discussed it with the Board of Five States on several occasions. JA. 620-21. Being familiar with the by-laws of Five States, it took

little imagination on Continental's part to insert the following provision in the "Tender Crust" private label agreement:

> "13. In the event prices on any of our regular advertised products shall, in response to, a general price decrease in any market fall below the prices in effect as of June 1, 1964, then any private label price set forth in paragraph 7, 8, and 9 shall be reduced in that market to a price *at least 1 cent below* the price on our comparable advertised items." (Emphasis added.) X. 852, JA. 600. App. 6a.

It was also understood that Continental would always keep the per unit wholesale price of its advertised label products equal to the price of its competitors' products (JA. 755, 841-42, 846, 866, 881-82) and, in accordance with the by-laws of Five States, each member was required to charge the same retail price for all products of the same size and quality regardless of label or baker (X. 753, JA. 579, X. 822, JA. 626). In this context, only one result could obtain: the grocer would always make at least one cent more profit on the sale of Tender Crust bread than any other label bread on the market. JA. 648, 708, 756, 846, 1266, 1287. This one cent or more guaranteed price differential arises out of the difference in price between Continental's advertised label products and its Tender Crust products. App. 6a. As the program was administered, if any other baker in the market attempted to *meet* the wholesale price of "Tender Crust" by lowering the price of its own bread, Continental would, under the Tender Crust program, lower the price of its advertised label bread to "meet competition" and lower its "Tender Crust" prices at least one cent under the advertised label price, thus *beating* competition in every case. JA. 648, 672, 773, 841-42, 846, 850-52, 866, 881-82, 981. On one occasion, the price of bread dropped one cent per day for a week: Rainbo dropped the price of its secondary label bread to meet the price of Tender Crust, then Continental dropped the price of its advertised label Wonder bread to meet Rainbo's secondary label price

and the price of Tender Crust was automatically dropped one cent below. JA. 881, 981.

It was this one cent or more price differential, provided for in the "Tender Crust" private label agreement, therefore, that made it impossible for Old Homestead or any other wholesale baker in the market to compete with Continental. JA. 648, 672, 1266, 1287. It requires no surfeit of imagination to conclude, as did both the jury and the court below, that there was clearly a proximate causal connection between Continental's price discrimination and Old Homestead's injury. App. to Petition 10a.

In addition to these facts in the record leading to the inevitable conclusion that Continental's price differential caused Old Homestead's injury, it is significant to note that there was ample evidence of predatory behavior on the part of Continental, including sales below cost. JA. 1649, X. 113-115. The Court of Appeals acknowledged the evidence in the record from which a strong inference of predatory intent on the part of Continental could be drawn. App. to Petition, 9a-10a.

By significant contrast, in *Borden Co. v. FTC,* 381 F.2d 175, 177 (5th Cir. 1967), the court concluded quite explicitly that "Borden is not in any sense guilty of predatory behavior. . . ." The importance of this factual distinction is aptly capsulized in the following statement of this Court in *Utah Pie Co. v. Continental Baking Co.,* 386 U.S. 685, 702 (1967):

> "Courts and commentators alike have noted that the existence of predatory intent might bear on the likelihood of injury to competition."

See also, *Anheuser-Busch, Inc. FTC,* 289 F.2d 835 (7th Cir. 1961); *Cornwell Quality Tools Co. v. C.T.S. Co.,* 446 F.2d 825 (9th Cir. 1971).

The different results in the present case and *Borden* are easily reconciled by recognition of the principle enunciated by the Federal Trade Commission in *Beatrice Foods Co.*, (1967-1970 Transfer Binder) Trade Reg. Rep. para. 19,045 (FTC 1969), *aff'd. sub nom. Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir. 1971), *cert. denied*, 404 U.S. 871 (1971):

> ". . . a finding of primary line injury might be based either on proof of predatory intent or on a market analysis, sufficient under the circumstances of the case to raise a reasonable probability of injury to competition. *National Dairy Products Corp. v. FTC*, 412 F.2d 605, 612-13 (7th Cir. 1969)."

Both the present case and the *Borden* case reflect an application of this principle to the facts of each case. In *Borden* (as in *Beatrice*) there was no evidence of predatory intent while in the present case the record was replete with such evidence. The decisions are comfortably compatible rather than in a "square conflict" as Continental would have this Court believe.

The Fifth Circuit's single comment upon the evidence in *Borden* to the effect that Borden did not subsidize below cost or low price sales on its private label milk with profits from its sales of advertised label milk can hardly be read as a holding that proof of subsidization is a *sine qua non* of liability under the Robinson-Patman Act. Indeed that suggestion was categorically rejected by the Seventh Circuit Court of Appeals in *Lloyd A. Fry Roofing Co. v. FTC*, 371 F.2d 277, 285 (7th Cir. 1966):

> "Petitioners urge that there can be no violation of Section 2(a) in area price discrimination cases unless the Commission finds that the higher prices elsewhere support the lower prices in the market under examination. We have been cited to no authoritative decision to support this view. No such requirement was enunciated

> in *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145, or *E. B. Muller & Co. v. Federal Trade Commission*, 142 F.2d 511 (6th Cir. 1944). Congress and the cases assume that the 'higher price to purchasers supports the lower price to others'. . ."

The critical distinction between the cases such as the present one and *Fry Roofing* on the one hand, and *Borden* and the other decisions relied upon by Continental on the other hand is that in the former there was evidence of predatory intent or behavior while in the latter there was a total absence of such proof. The omission of evidence of predatory intent was recognized by the respective courts in *Borden Co. v. FTC*, supra; *Shore Gas & Oil Co. v. Humble Oil & Refining Co.*, 224 F.Supp. (D.N.J. 1963); and *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F.Supp. 796 (S.D. Cal. 1952), aff'd. 231 F.2d 356 (9th Cir. 1955), *cert. denied* 350 U.S. 991 (1956), *rehearing denied* 351 U.S. 928 (1956). This factual distinction and its importance have been emphasized by commentators. See, for example, 16C von Kalinowski, Business Organizations, §29.03[4], p. 29-92-29-93, fn. 99 where it is concluded, following a discussion of the decisions, that proof of predatory intent "clearly establishes the requisite nexus between the price discrimination and the competitive injury."

Since Continental's position is primarily based upon its expansive reading of the dictum in the Fifth Circuit *Borden* decision, a close scrutiny of the evidence in that case is both necessary and instructive. Incredibly enough, Continental ventures the bold and conclusory proposition that "the facts of this case are indistinguishable" from those in Borden. Petition, 11. The deceiving inaccuracy of this statement is highlighted by the following comparative analysis:

> (1) Borden did not charge "below-cost or unrealistically low prices on its private label milk . . ." 381 F.2d at 177. Continental sold at prices below cost for extended periods. JA. 1649, X. 113-15.

(2) Borden was "not in any sense guilty of predatory behavior similar to that which may accompany territorial price wars." 381 F.2d at 177. The Court of Appeals in the instant case expressly acknowledged the existence of evidence of predatory behavior in the record, including sales below cost (JA. 1649, X. 113-15, JA. 1632), discriminatory price cuts "represented by discounts to Tender Crust customers only," (JA. 590-91, 928-29), as well as the evidence that Continental set for itself and accomplished the seemingly impossible goal of increasing production by 50% in four years in order to operate its oversized Denver plant at a profit (JA. 823, 930, 2078, 2080, X. 823, JA. 2099). The Court of Appeals found this achievement indicative of more than "fierce competitive instincts." App. to Petition, 10a. Another significant fact evidencing predatory intent was Continental's price raise and abolition of discounts merely two days after Old Homestead had ceased to do business. JA. 919-20. The Court of Appeals noted the existence of other evidence as well which would create a "strong inference" of predatory intent by Continental. App. to Petition, 10a.

(3) The *Borden* case did not "involve any device similar to the conventional volume discount." 381 F.2d at 177. Continental employed such a device in the form of its so-called weekly specials which clearly constituted a thinly-disguised discriminatory allowance in favor of the A.G. stores. JA. 694-95.

(4) In *Borden,* "all of Borden's customers, large and small alike, paid the same prices for the Borden brand milk or for the private label milk." 381 F.2d at 177. In the present case the Tender Crust private label bread and its special pricing schedule were made available by Continental only to A.G. stores who were members of Five States and who were thus willing to accept the strictures imposed by Continental (JA.

591, 765, X. 822, JA. 626), including the requirement that Tender Crust be given the preferred rack position and Wonder the second best position (X. 850, JA. 579). Moreover, Continental's other private label breads were not made available at the same price and on the same basis as Tender Crust. JA. 912. Finally, a vast number of customers purchased Wonder bread at the regular list price rather than the lower price offered to the purchasers under the Tender Crust program. JA. 2074-75.

(5) The evidence in *Borden* demonstrated that "Borden's practices did not lead to a substantial increase in Borden's market position at the expense of [its] competitors." 381 F.2d at 179. The practices of Continental permitted it to increase its tonnage of sales from the Denver plant by a phenomenal 50% and its increase in market share by 15% resulting in a 51.5% of the market as noted in the opinion of the Court of Appeals. App. to Petition, 8a, JA. 853. This increase was manifestly at the "expense of its competitors" as dramatically illustrated by the fact that Old Homestead, the only true independent in the market, was driven out of business altogether. JA. 907-08.

The record in the instant case so overwhelmingly dispels any suggestion that the *Borden* case is factually "indistinguishable" that one may safely conclude that the only notable similarity between the cases is the fact that they both involved private label products.

Continental consistently attempts to characterize the Court of Appeal's ruling as an all-out frontal assault on the whole concept of private labeling. For example, Continental inaccurately frames the issue in the case as "the degree to which . . . [the Robinson-Patman] Act may be construed to prevent sellers from passing along to their customers the cost savings inherent in private label merchandising." Petition, 8, 9.

Old Homestead has no quarrel with the basic institution of private label merchandising—but only with the predatory and piratical abuse of the institution of which Continental has been guilty. This Court has not been deceived by the bold suggestion that private label programs are entilted to an automatic immunity status under the federal antitrust laws.

For example, in *FTC v. Borden Co.,* 383 U.S. 637, 646 (1966) this Court concluded:

> "The arguments for exempting private brand selling from §2(a) [of the Clayton Act as amended by the Robinson-Patman Act] are, therefore, more appropriately addressed to the Congress than to this Court."

Similarly, in the very recent holding in *United States v. Topco Associates,* 405 U.S. 596, (1972) this Court flatly rejected the notion that private label programs, no matter how conducted, are endowed with an aura of per se legality under the antitrust statutes.

By quoting out of context, Continental has tried to characterize the holding of this Court in *FTC v. Borden Co.,* 383 U.S. 637 (1966) as being favorable to the concept of private label programs. The following statement is from page 14 of Continental's Petition:

> "[T]his Court itself has characterized the provisions of the Robinson-Patman Act that are applicable to the sale of private label products as being 'flexible . . . provisions' that may take account of the difference between 'branded and unbranded commodities,' " quoting from 383 U.S. at 646.

Compare the generality and coloration of Continental's statement with the actual language of this Court in *Borden:*

> "[T]angible consumer preferences as between branded and unbranded commodities should receive due legal

> recognition in the more flexible 'injury' and 'cost justification' provisions of the statute.' " 383 U.S. at 646, quoting from Report of the Attorney General's National Committee to study the Antitrust Laws 159 (1955).

This Court was simply saying that if any special consideration were to be afforded private label pricing, such consideration would have to be pleaded under one of the Act's *defense* provisions. The private label concept would not prevent a finding of a prima facie violation. As this Court's quotation makes clear, special recognition would only be given private label pricing where the price differential reflected "tangible consumer preferences." Continental's pricing scheme in the present case has nothing to do with consumer preferences and indeed even stifles this notion; for although Continental sold its Tender Crust bread to the Five States stores at a price guaranteed to be one cent lower than the price of Wonder bread, the by-laws of Five States required that the two brands of bread be resold at retail to the housewife at *identical* prices. X. 753, JA. 579. Indeed this provision was at the very core of Continental's scheme. Consumer preference is thus completely absent from this case, which involves discrimination and injury at the primary level rather than a differing price structure between private labeled advertised products at the secondary or retail level.

It is absurd to suggest, as does Continental, that the decision in the present case dealt a death blow to private label marketing. Indeed it is the contrary result which would have been shocking and economically destructive, for it would mean that a national giant such as Continental could stage predatory and even fatal wars on its local competitors, provided it fought behind the banner of the private label. Moreover, Continental is hardly in a position to analogize itself to or champion the cause of "smaller grocery stores" (Petition, 9), or "small independent retailers" (Petition, 14). The Court of Appeals' decision, like the ruling of this Court in *Topco,* merely vindicates

the overriding policy of the Sherman and Clayton Acts— anti-competitive and predatory conduct, under whatever guise, will not be condoned.

Although the evidence abundantly established the causal nexus between Continental's price discrimination scheme and Old Homestead's injury, and although the existing state of law does not require any additional showing of "subsidization", the record does demonstrate that Continental had a sufficient national "treasury" to enable it to finance its warfare and absorb losses in the Denver market. cf., *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 118 (1954). While Continental's Denver bakery lost eighty thousand dollars in 1964, one hundred seventy-nine thousand dollars in 1965 and two hundred fifty thousand dollars in 1966 during the Tender Crust Program, its national bakery operations showed an average yearly profit of approximately fifteen million four hundred thousand dollars during these three years. X. 823, JA. 2099.

II.

NEITHER THE EVIDENCE NOR THE APPLICABLE LAW SUPPORTS CONTINENTAL'S CONTENTION THAT IT MAY AVOID LIABILITY ON THE GROUND THAT THE PRIVATE LABEL PRICING WAS "AVAILABLE" TO ALL OF ITS CUSTOMERS.

Continental contends that it cannot be held liable because both its advertised label and private label breads were made "available" to all of its customers.

This "availability" argument is deficient in two respects: the law and the facts. From a factual standpoint the record is simply barren of any evidentiary showing of "the full availability of both the lower priced private label and the higher priced advertised bread to all purchasers." Petition, 17. On the contrary, the evidence demonstrated that Continental offered its Tender Crust private label program only to A.G. stores. This fact was openly admitted. JA. 693, 765, 928.

Beyond this, "Continental served approximately 253 charge account customers from its Denver bakery who purchased Wonder label bread . . . at the regular list price" (i.e., rather than at the special prices prevailing to those in the Tender Crust program). JA. 2075.

Moreover, the conditions and strictures which Continental attached to its proposal to sell the private label bread to even the A.G. stores dispel any notion that both breads were "available," within any commonly accepted and reasonable meaning of the word. The opinion of the Court of Appeals expressly acknowledged the "unavailability" of the private label program in view of the fact that the A.G. customer, in order to be eligible for the program, had to become a Five States member and accept the following conditions and requirements imposed by Continental:

> "These requirements included a membership fee of $100.00, an agreement to give Tender Crust bread the best shelf space, with the second best to Continental's advertised label and to participate in the promotion of weekend specials. We find no basis to apply the availability doctrine." App. to Petition, 16a.

At this juncture Continental apparently does not argue with the fact that it did not offer its Tender Crust label program to all of its purchasers. However, it now argues that it offered bread "under a variety of private labels to all buyers in the market at the established private label price." Petition, p. 18.

The patent fallacy of this argument is that Tender Crust bread was not sold at the so-called "established private label price," i.e., the price shown in X.. 915 upon which Continental relies in staging this argument. Instead, the Tender Crust bread was sold at various discount rates rather than at the list price. JA. 587, 845. Thus, under the Tender Crust agreement (X. 885, JA. 600) there was a 2% central billing dis-

count in effect (X. 886, JA. 600), along with a monthly volume discount of from 7% to 11% (X. 886, JA. 600), both of which discounts were applied to the Tender Crust list price. The net result was that while Wonder bread was being sold at sixteen cents per unit and Continental's other private label products were being sold at fifteen cents per unit, the Tender Crust bread was, as a result of the discounts, being sold at approximately 13.5 cents per unit.

Thus, even assuming arguendo that some private label bread was available to all of Continental's customers, the Tender Crust discount pricing was clearly *not* available to all of the purchasers, and this argument is again totally precluded by the facts of record.

Although the evidence at trial provided no underpinning for consideration of Continental's "availability" defense, and although (as the discussion below will demonstrate) the applicable law does not permit use of such a defense in a case such as the present one, the trial court, in an apparent abundance of caution, actually instructed the jury that there would be no violation if the Tender Crust private label bread was "offered indiscriminately to everybody . . ." JA. 2659. The jury, like the Court of Appeals, obviously found Continental's availability claim to be factually unsupportable.

From a legal standpoint it is imperative to stress that the so-called "availability" doctrine is not applicable in a case involving injury at the seller level; i.e., the primary line of competition. See 16C von Kalinowski, Business Organizations §29.03 [3] at p. 29-87:

> "To date, . . . the 'availability' doctrine has not been successfully invoked in any primary line proceeding. Perhaps the principal reason is that while the availability of the lower price might negate competitive injury to buyers to whom the lower prices are readily available, it is, according to one view, 'more difficult logic-

> ally to conclude that competing sellers have not been injured merely because buyers had available to them the lower prices of the challenged seller.'" (Quoting Attorney Gen. Rep. 127, n. .20 (Supp. 1968)).

This logical rule was recognized in the quite recent ruling of the Court of Appeals of the Fifth Circuit in *Hampton v. Graff Vending Company*, 478 F.2d 527, 534 (5th Cir. 1973) and the court rejected the defendant's availability argument:

> "Based on the findings of the district court, Graff has continued to assert that no discrimination occurred because the sale price was available to Hampton. This secondary line argument carries no weight in a primary line case." 478 F.2d at 534. fn. 12.

The Court of Appeals in the present case also noted this legal principle: see App. to Petition, 159.

In summary, the evidence at trial refuted rather than supported Continental's contention that both its private label and advertised label breads were available to all purchasers, and, as the Court of Appeals recognized, there is neither factual nor legal support for this contention. As far as the present proceeding is concerned the "availability" defense is simply not available.

III.

THE THREE ADDITIONAL UNREVERSED VERDICTS IN FAVOR OF OLD HOMESTEAD BASED ON VIOLATIONS OF THE SHERMAN ACT PROVIDE A STRONG ADDED GROUND FOR DENIAL OF REVIEW.

Rule 24(1) of The Supreme Court Rules provides that a respondent shall file "an opposing brief disclosing any matter or ground why the cause should not be reviewed by this Court."

An additional reason why this cause should not be reviewed is that the judgment under attack is supported by four separate verdicts and Continental has attacked only one of such verdicts. If Continental desired a reversal as to Old Homestead it should have brought all four verdicts to this Court. As it has failed to do so, its petition for certiorari based on but one of the verdicts should be denied.

CONCLUSION

For the reasons herein stated the Petition for Certiorari should be denied.

Respectfully submitted,

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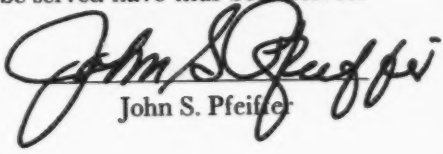
Dated: August 30, 1973

CERTIFICATE OF SERVICE

This is to certify that I have this date served the attached Brief in Opposition to Petition for Writ of Certiorari on Continental Baking Company and on Interstate Brands Corp. by mailing three copies of the same, airmail postage prepaid, to their respective counsel of record, John H. Schafer, 888 16th Street, N.W., Washington, D.C. 20006, E. Edward Bruce, Covington & Burling, 888 16th Street, N.W., Washington, D.C. 20006 and Edward L. Foote, Winston, Strawn, Smith & Patterson, First National Bank Building, Chicago, Illinois 60603. All parties required to be served have thus been served.



John S. Pfeiffer

August 30, 1973

APPENDIX

(Portion of Plaintiff's Exhibit #52 X752-753)

Article III of the By-Laws
Five States Supply Co.

COVENANTS OF MEMBERS

The members recognize that one of the primary purposes of this Corporation is to foster, promote and encourage the business of supplying its members with bread and bakery products for resale to the retail public, and to reform abuses in said business and to secure for such members freedom from unjust and unreasonable exactions. The members also recognize and agree that this Corporation has secured the exclusive use of the trade and service mark "Tender Crust" for their benefit and each member agrees, in consideration of the agreement of the other members, to use his best efforts to establish the name "Tender Crust" in order that there will be a demand in the retail trade sufficient to create the sale of "Tender Crust" bread and other bakery products equal to that of national and local bakery brands.

In consideration of these premises the members agree that they will each use their best efforts as members of this Corporation to promote the aims and purposes thereof and agree specifically that they are duty bound to and will promote the "Tender Crust" bakery label at all times and in every possible manner including the following:

1. To buy and resell "Tender Crust" label bakery products and assist and give their best effort in presenting, maintaining and enlarging the sale of "Tender Crust" label bakery products for their own benefit and

for the benefit of all other members hereof who also handle such label.

2. To always provide fresh bread on the regular bread rack.

3. To give first position on the regular bread rack to "Tender Crust" label bakery products.

4. To devote % of space on the regular bread rack to "Tender Crust" label bread.

5. To give second position on the regular bread rack to the bakery products carrying the label of the baker or manufacturer providing or baking "Tender Crust" products.

6. To take particular care of the bread rack at all times in order that the "Tender Crust" section shall always be neat, clean and orderly.

7. Each member agrees that said "Tender Crust" label bread shall always be on consignment to the member and ownership thereof and title thereto shall remain in the Company until disposed of by a member in the ordinary course of retail trade.

8. Each member agrees that, in order to maintain and keep "Tender Crust" bakery products in a competitive price position, he will, upon notice to him from any other manufacturer of other bread products, of any change of price, whether decrease or increase, immediately change the retail price of "Tender Crust" so that it will always be offered at the same price of any other bakery products of the same quality, weight or size.

(Plaintiff's Exhibit 124A-D X 849-852)

Five States Supply, Inc.
Denver, Colorado

Gentlemen:

In view of the recent competitive developments in our market we wish this letter to serve as our written offer to you on a private label arrangement. This confirms recent oral offers made by us with reference to our supplying your member stores with bakery products carrying your own brand name. These products will be produced by us at our Denver, Colorado Bakery and will be sold to your member stores in accordance with the following terms and conditions:

1. All bakery products sold to you pursuant to this contract will be of quality comparable to our regular Wonder and Hostess Products. Formulations will be made by us in consultation with our Research and Development Laboratories.

2. All packaging and labels will be supplied by us subject to your prior approval.

3. We will assist your personnel in the proper display and promotion of all products. When advisable, we will supply point of purchase material and dislocated displays to accomplish this aim. Sampling and in-store demonstrations will be used from time to time at our discretion. Five States Supply agrees to use their best efforts causing their members to cooperate with us in these activities. Qualified and experienced sales personnel will be assigned by us to assist your member stores in the above program.

4. You agree to make available to us adequate preferred space on your member bakery products racks for the display of our regular Bread, Cake and

Sweet Goods products so that the full sales potential of these advertised brands can be realized. You agree in requesting your members to cooperate with us in arranging special weekly promotions on said advertised brand items.

5. Deliveries of all products to your member stores pursuant to this agreement shall be made by our regular Wonder and Hostess route salesmen from their regular delivery trucks. We will give complete rack service and will be responsible for all stale returns.

6. Introduction into your member stores of products listed below will be made as soon as practical after August 10, 1964. At any time during the existence of this contract, we will discuss with you the addition of other items to be sold hereunder.

7. You agree to pay us for products produced and delivered under this contract at the following prices on weekly credit terms.

Variety	Price	Advertised Brand Price as of June 1, 1964
1 Pound Expanded Bread	.175	.185
1¼ Pound Round-Top Bread	.22	.235
1¼ Pound Sandwich Bread	.22	.235*
8 Pack Cluster Buns	.21	.23
8 Pack Coffee Buns	.21	.23

The above prices will apply to both White and Wheat Bread if there are both varieties in the same weight category.

*This price was not in effect on June 1, 1964 but will be considered to have been in effect on that date for the purposes of this contract.

8. In the event you wish to purchase products with no stale returns to be absorbed by us, the prices will be as follows:

Variety	Price	Advertised Brand Price as of June 1, 1964
1 Pound Expanded Bread	.16	.185
1¼ Pound Round-Top Bread	.195	.235
1¼ Pound Sandwich Bread	.195	.235
8 Pack Cluster Buns	.20	.23
8 Pack Coney Buns	.20	.23

9. In the event you wish to purchase products on a drop-shipment basis to each of your member stores whereunder you will be responsible for rack service and stale returns, prices will be as follows:

Variety	Price	Advertised Brand Price as of June 1, 1964
1 Pound Expanded Bread	.15	.185
1¼ Pound Round-Top Bread	.185	.235
1¼ Pound Sandwich Bread	.185	.235
8 Pack Cluster Buns	.19	.23
8 Pack Coney Buns	.19	.23

10. All products hereafter sold by us to you pursuant to this agreement are hereby guaranteed not to be adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act, as amended, or any substantially similar state law. We agree to indemnify you against any claims made against you or losses sustained by you arising out of the purchase or use of products covered by this agreement provided such claims or losses do not result from your negligence or that of your agents and